

General Versus Special Statutes in Ohio

W. T. MALLISON, JR.*

Introduction

Before the Civil War there was widespread recognition that the state legislatures were abusing their power to enact special and local legislation.¹ There was no doubt at all that power to enact statutes of this character existed under the accepted American theory that the power of state legislatures is plenary except as specifically restricted. It was equally certain that there were proper occasions for the use of a special statute. A law for the relief of a particular person under circumstances thought to create a moral obligation on the part of the state but where no remedy was otherwise provided is an example. However, the state legislatures, Ohio's included,² abused special statutes by passing them in numbers out of all proportion to need and without any serious attempt by the whole memberships of the legislatures to examine the merits of proposed bills. Those members whose constituents were immediately affected usually sponsored the legislation and log-rolling tactics customarily resulted in its adoption. The abuse of special legislation became the normal state of affairs. Municipalities became the particular victims of irresponsible legislative majorities.³ There is no evidence to support the view that special statutes were used because they were considered more effective in the circumstances as a matter of policy. Rather, the view was that the legislature could more effectively maintain its own overriding control by the use of specialism.

Constitutional provisions were supplied in order to prevent special legislation in those situations where general legislation could do the job more effectively or in situations where special legislation was believed to have been abused.⁴ At the present time

* Sterling Fellow, Yale Law School; Teaching and Research Assistant, the College of Law, The Ohio State University, 1949-1950.

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¹ For a discussion of the background of legislative abuse of special laws, see Cloe and Marcus, *Special and Local Legislation*, 24 Kx. L. J. 351, 355-358 (1936).

² For a discussion of legislative abuse of special laws in Ohio, see Walker, *Municipal Government in Ohio Before 1912*, 9 OHIO STATE L. J. 1 (1948).

³ Many state constitutions now contain express prohibitions against special legislation regulating municipalities as well as a general provision against special legislation. See, e.g., MINN. CONST. Art. IV, § 33.

⁴ See 2 SUTHERLAND, STATUTORY CONSTRUCTION § 2101 (3rd ed., Horack, 1943).

there are several types of such state constitutional provisions. Missouri, for example, prohibits local and special laws in twenty-nine enumerated instances and in any instances where a general law can be made to apply.⁵ It is expressly provided that the problem of the applicability of a general law is a judicial question.⁶ A number of states simply have the general provision that no special law can be enacted where a general law can be made applicable.⁷ Where the state constitutions do not speak to the point there is a division of opinion among the courts as to the "judiciality" of the provision.⁸ A third group of states prohibit special laws when there is already a general law on the subject.⁹ This small group, in effect, permits legislative determination of generality or specialty but does not allow both general and special legislation to co-exist on the same subject. Ohio belongs to still another group. All of the states which prohibit or restrict special legislation stand in conspicuous contrast to the federal government which has no such limitation in its basic law.¹⁰ Some of the states have no constitutional provisions dealing with the subject.

The most important of the various Ohio constitutional provisions concerned with special and general legislation is Article II, Section 26, which provides, in part, "All laws, of a general nature, shall have a uniform operation throughout the State. . ." A definition of "laws, of a general nature" is not provided. Perhaps the provision of a guide to the meaning of the phrase was regarded as superfluous by the members of the Constitutional Convention of 1851 who were probably quite sure that the clause was aimed at the then plethora of special and local legislation and required no explanation beyond the facts which brought it into existence. In any event, a substantial body of case law has been applied to its interpretation.

Article II, Section 26,¹¹ is written in general language and has been held to apply to all subjects except those explicitly and ex-

⁵ Mo. CONST. Art. III, § 40. Many of the enumerated items are applicable to local government units.

⁶ Mo. CONST. Art. III, § 40, sub. 30.

⁷ See, e.g., MICH. CONST. Art. 5, § 30.

⁸ See 2 SUTHERLAND, STATUTORY CONSTRUCTION § 2103 (3rd ed., Horack, 1943).

⁹ See, e.g., PA. CONST. Art. III, § 7.

¹⁰ The equal protection of the laws clause of the Fourteenth Amendment to the Federal Constitution is, however, relevant to the problem of classification. "Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment." *Barbier v. Connolly*, 113 U.S. 27, 32 (1885).

¹¹ The Ohio constitutional provisions will be frequently referred to only by article and section numbers.

clusively provided for by other sections of the constitution. Article IV, Section 1, for example, empowers the legislature "from time to time" to establish courts inferior to the courts of appeal and the general laws provision of the constitution is considered inapplicable.¹² In the same way, Article II, Section 30, requires special legislation for establishing new counties, changing county lines, or removing county seats.¹³ The requirement is implicit but clear because general legislation would be inconsistent with the procedure established in the constitutional provision.

Section 32 of Article II expressly provides that the legislature "shall grant no divorce", so it is unnecessary to consider what effect Article II, Section 26, standing alone, would have as to legislative divorces. Another express prohibition on special legislation is found in Article XIII, Section 1, which declares quite simply, "[t]he General Assembly shall pass no special act conferring corporate powers." This provision applies to municipal as well as private corporations.¹⁴

Complementary to the provision just quoted is Section 2 of Article XIII which requires general laws for the creation and regulation of private corporations. Section 6 of the same article requires the legislature to "provide for the organization of cities and incorporated villages, by general laws." Both municipal and private corporations were justly regarded as important and particularly dangerous subjects of special legislation, hence their specific prohibition in addition to the general one found in Article II, Section 26.

In short, Article II, Section 26 (frequently referred to in this article as the general laws provision) is of general applicability except as limited by other parts of the constitution.¹⁵ The common sense rule of constitutional interpretation that the particular provision most closely related to the subject matter in question will be held applicable has been adhered to in Ohio. Curative statutes, not covered in Article II, Section 26, are permitted with certain restrictions in Section 28 of the same article.

¹² Neither the official syllabus nor the opinion in *State ex rel. Fox v. Yeatman*, 89 Ohio St. 44, 105 N.E. 74 (1913), wherein a special statute concerning a municipal court was upheld, mentioned Article II, Section 26.

¹³ Article X, Section 1, requires general laws for the organization and government of counties.

¹⁴ *State ex rel. Knisely v. Jones*, 66 Ohio St. 453, 64 N.E. 424 (1902); *Cincinnati v. Trustees of Cincinnati Hospital*, 66 Ohio St. 440, 64 N.E. 420 (1902).

¹⁵ In *Ex Parte Falk*, 42 Ohio St. 638 (1885) it was held that Article II, Section 26 was mandatory rather than merely directory.

General Laws — Classification

A. MUNICIPAL CORPORATIONS

As has been indicated already, the problem of specialism has been particularly acute in the field of municipal corporations.¹⁶ It is, therefore, the plan of this article to consider first the requirements of generality as applied to municipal corporations both because of the intrinsic importance of the subject and because it is believed that an analysis of the requirements as to municipalities will provide considerable informational background for the subjects to be considered at a later juncture.

1. *Historical development prior to 1851.*

It should be mentioned at once that the historical background of municipal government in Ohio has been carefully and fully analyzed in the pages of this *Journal* in an article by Professor Harvey Walker.¹⁷ The treatment here will be confined to a brief survey of the use of special and general legislation in relation to municipalities prior to the adoption of the Constitution of 1851.

In territorial times the small number of municipal units were incorporated by occasional special legislation. There is no reason to believe that the method was not adequate to the situation presented. Even if the use of general laws would have been preferable, the small amount of special legislation relating to municipalities did not burden the legislature.

Under the first Ohio Constitution¹⁸ the legislature was left free to deal with municipalities as it saw fit. There was not even the possibility of gubernatorial veto to act as a brake. Beginning with Chillicothe¹⁹ in 1804, a series of special acts was passed. In 1817 the first general law for the incorporation of municipalities was passed by the legislature.²⁰ The incorporation procedure utilized is interesting today principally because of the use of the court of common pleas as a fact-finding agency.

Following the passage of the general incorporation law of 1817 there was, for a few years, a substantial lessening in the number of special charters granted. Particular amendments to previously-granted special charters continued in undiminished volume. The general act of 1817, however, appeared for a while to have substantially reduced the total amount of special legislation even though it only briefly stopped special chartering. By 1834 the situation had so deteriorated that the Thirty-third General Assembly passed fifty-eight pages of general laws in contrast to four

¹⁶ See note 3 *supra*.

¹⁷ Walker, *supra* note 2.

¹⁸ Constitution of 1802 which became effective in 1803.

¹⁹ Act of Feb. 18, 1804.

²⁰ Act of Jan. 7, 1817.

hundred sixty-five pages of special and local laws. In 1838 the legislature came to its own rescue by passing another general incorporation law.²¹ For a few years the special acts passed referred to the general law for provisions as to organization or powers, but by 1844 this practice was reversed and the tendency to do everything in the special statute reappeared. The Forty-eighth General Assembly demonstrated how well the old system was re-established by passing seven hundred sixty-seven pages of special and local laws and only one hundred twenty-nine pages of general ones. In May, 1850, when the Second Constitutional Convention of Ohio met, there was apparently widespread belief that something should be done to relieve the legislature of the crushing burden of special legislation and the municipalities themselves of the evils of legislative log-rolling.

2. *The Constitutional Convention of 1850-1851*

Delegate James W. Taylor of Erie County stated his view of the existing situation in the course of the debate on the floor of the convention which framed the Constitution of 1851: "[i]t has been frequently said that three-fourths of the laws of Ohio are special and local in their nature; and I believe that an effort will be made to confine the Legislature to general regulations exclusively."²² The effort was made and succeeded even though the Convention appeared to spend more time, insofar as the debates are indicative, on the problem of general incorporation laws for private corporations. There is no record of debate on any of the provisions of Article XIII which was accepted by the Convention on March 10, 1851.²³ The significant section, as far as municipalities were concerned, was the sixth which provides, in part: "The General Assembly shall provide for the organization of cities, and incorporated villages, by general laws. . ." Probably no member of the Convention of 1850-1851 had any idea of the vagaries of judicial interpretation to which this section would be subjected. The first section, which also has importance for municipalities, provides: "The General Assembly shall pass no special act conferring corporate powers."

Two basic sections were placed in Article II, the portion of the constitution dealing with the legislature, which were to have far-reaching general influence. Section 26, the provision requiring general laws to have uniform operation, has already been mentioned. Section 28 provides that "[t]he General Assembly shall have no power to pass retroactive laws, . . . but may, by general laws, authorize courts to carry into effect upon such terms as shall

²¹ Act of Feb. 16, 1838.

²² 1 Ohio Convention Debates 285 (1851).

²³ 2 Ohio Convention Debates 851 (1851).

be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this State." It is apparent at a glance that both of these sections are applicable to statutes dealing with local government in general as well as to municipal corporations. The language in Section 26 requiring "uniform operation" apparently calls for judicial interpretation, whereas the wording of Section 28 requiring curative statutes to be general ones seems to be more precise and meaningful standing alone.

In *Case v. Dillon*²⁴ the court considered the validity of an act passed on March 24, 1851 (prior to the effective date of the Constitution of 1851) which authorized Muskingum County to subscribe to the capital stock of a specified railway corporation. Article VIII, Section 6, of the new constitution provided that the "General Assembly shall never authorize any county, town, or township" to become a stockholder in any corporation. By a three-to-two vote the court upheld the statute, primarily on the ground that the new constitutional provision was only prospective in operation. The case is significant for our purposes because the court first undertook to interpret Article II, Section 26, in it. Judge Thurman, writing for the majority, appeared to assume at once that the statute was not of a general nature. He wrote, "[i]t is no more of a general nature than would be an act to authorize the construction of a bridge or the erection of a poorhouse."²⁵ The corollary found by the court was that the act was necessarily, by its nature, a local one and so the constitutional provision dealing with laws of a general nature was inapplicable. There was no indication that the court considered the possibility that legislation authorizing local government investment in private corporations might be a proper subject for a general law. By uncritically seizing upon the idea that certain subjects were local in nature, the court opened the door to widespread evasion of the constitutional mandate of uniformity of operation. The vigorous dissent of Judge Ranney did not discuss Article II, Section 26.²⁶

3. The Period 1851-1912

In 1852 it would have appeared to a careful observer that the new constitution had achieved its aims insofar as general legislation was concerned. Proof would have been found in that the special laws of 1852 comprised forty-seven pages while the general ones filled three hundred forty-eight pages. On May 3, 1852, existing laws relating to the organization and government of municipal

²⁴ 2 Ohio St. 607 (1853).

²⁵ *Id.* at 617.

²⁶ *Id.* at 624-647 (dissenting opinion).

corporations were repealed and, by the same general statute, means were provided for the organization of "cities and incorporated villages". Municipal corporations were divided into three broad classes: cities of the first class were all those of over 20,000 population; cities of the second class were units below that figure with a population of at least 5,000; villages were of less than 5,000 population. By an amendment of March 25, 1854, a local option provision was inserted in the general law: a municipal corporation would not advance to the next higher population grouping without the approval of its council. The symmetry of the classification scheme could, thus, be impaired at the will of a municipal council.

During the fifty-year period from 1852 to 1902 the legislature departed radically from the three-class arrangement it had followed immediately after the adoption of the new constitution. By 1880 generality in form had become a cloak for specialty in fact.

In one term of court, in just a few months, the entire classification structure so painstakingly built up over a period of years was brought crashing down to earth.²⁷ When the January, 1902 Term of the Ohio Supreme Court commenced there was a plethora of classifications. Each of the eleven largest cities of the state was placed in a different grade of the hierarchy. Special legislation under the guise of classification had become sanctified by the passage of time and implicit judicial approval. The members of the legislative department had little reason to suspect that the judicial department would say nay to what had been done.

In 1900 the legislature had passed a "general" law empowering Toledo to construct or repair a bridge across the Maumee River in which Toledo was described as "any city of the third grade of the first class" having a "navigable river or rivers, passing into or through any such city."²⁸ In *Platt v. Craig*²⁹ a taxpayer asked that defendant officials of the city be restrained from proceeding under the statute. At about the same time another taxpayer asked mandamus to compel the mayor of Toledo to submit to the voters the question of acting under the permissive statute.³⁰ The decision resolved both disputes. Judge Davis, speaking for a unanimous court, immediately stated that constitutional questions were presented and disclaimed any intention to reconcile the previous decisions in the area, after pointing out that some of them were based on expediency. He then stated that the constitution, having emanated from the people, "must be construed as the people must have understood it"³¹ and, with the aid of a dictionary, determined

²⁷ The January, 1902 Term.

²⁸ Act of April 14, 1900.

²⁹ 66 Ohio St. 75, 63 N.E. 594 (1902).

³⁰ *Jones, Mayor of Toledo v. State ex rel. Walbridge*, *supra*, note 29.

³¹ 66 Ohio St. 75, 77, 63 N.E. 594, 595 (1902).

that the words "general" and "special" were antonyms. The court concluded that the classification was "exceedingly artificial and a sham"³² and that the statute was unconstitutional as violative of Article XIII, Section 1, and, in the alternative, Article II, Section 26. The reasoning as to the former was that the statute was special in that it applied only to Toledo and that it was a forbidden attempt to confer corporate powers. The latter section was violated because, even if it was a law of a general nature, it was limited to one particular city. There was a dictum to the effect that Article II, Section 26, did not prohibit all special legislation and that an emergency could legalize some special legislation.³³ Judge Burket did not concur in this portion of the opinion or syllabus. The *Platt* case revealed the weakness of the structure of classification but its practical effect was limited to a vitiation of the one statute before the court.

The *Platt* case was decided on March 18, 1902. On the following April 29th the legislature passed a special statute expressly applicable only to the Cincinnati Hospital which purported to confer certain additional powers on the trustees of the hospital. The hospital was a municipal institution and, at the request of a taxpayer, the corporation counsel sued to enjoin the issuance of bonds and the expenditure of money under the statute. The case came before the court in *Cincinnati v. Trustees of Cincinnati Hospital*³⁴ and the defendants pleaded a local and temporary emergency in Cincinnati in reliance on the emergency language in the *Platt* case. The court about-faced and said, "[a] sufficient answer to this contention is that such doctrine is not decided in nor encouraged by the case cited."³⁵ It would have been more candid to admit what was said in *Platt*, including the statement of the emergency doctrine in the official syllabus, and to reach the result in the *Cincinnati Hospital* case on the basis of new-found wisdom. Instead the court said that the second paragraph of the syllabus and the opinion related only to Article II, Section 26.³⁶ While this statement was entirely accurate, it should not have been allowed to obscure the identity of the fact patterns in the two cases. Both were cases in which a municipal corporation was to receive corporate power from an abortive statute. The court went on to say that "[i]t was obvious not only to the member of the court who wrote the opinion in that case [the *Platt* case], but to all

³² *Id.* at 81, 63 N.E. at 596.

³³ See *id.* at 78, 63 N.E. at 596.

³⁴ 66 Ohio St. 440, 64 N.E. 420 (1902).

³⁵ *Id.* at 447, 64 N.E. at 422.

³⁶ The court did not think that the syllabus related to Article XIII, Section 1.

of us, that the unconditional terms of the inhibition against special acts conferring corporate power would not admit of any exception."³⁷ The syllabus of the *Cincinnati Hospital* case made no mention of Article II, Section 26, and the opinion does not decide whether it was violated. The decision was based on violation of Article XIII, Section 1, by the statute which purported to confer corporate powers on the hospital trustees.

In *State ex rel. Knisely v. Jones*,³⁸ decided two days after the *Cincinnati Hospital* case, an act of April 27, 1902, was held unconstitutional. The action was an original one in mandamus brought in the supreme court by the unfortunate petitioners, newly appointed police commissioners of Toledo under the act of April 27, 1902, to compel the defendants, incumbent commissioners, to surrender commission property. The act provided for "the appointment, regulation, and government of a police force in cities of the third grade of the first class." That it affected no municipality but Toledo was admitted. The attorney general, for the petitioners, relied on the long line of decisions sustaining classification and pointed out that there was no law on the subject except the one under which petitioners claimed as it had expressly repealed all other laws on the subject. The defense relied on Article XIII, Section 1, which had been such a bulwark in the *Cincinnati Hospital* case. The unanimous opinion of the court was delivered by Judge Shauck, who brushed aside relators' contention that there was no other law on the subject by pointing out that the repealing section of the act under attack would fall unless the rest were valid. Judge Shauck then proceeded to make a twofold argument: first, that the statute attempting to reorganize the board of police commissioners of Toledo was a special act granting corporate powers contrary to the prohibition of Article XIII, Section 1; and, secondly, that the classification of cities of the third grade of the first class was a sham as it only included Toledo. The second branch of the argument received detailed consideration. The history of the classification of municipalities was reviewed and it was pointed out that the existing absurd number of classifications was similar to the situation existing prior to the adoption of the Constitution of 1851. The court found further evidence of legislative intent to use classification as a cloak for special legislation in Section 1546 of the Revised Statutes of Ohio which provided that "[c]ities of the second class which hereafter become cities of the first class, shall constitute the fourth grade of the latter class." There were no cities of the fourth grade of the first class; it was just insurance against second class cities moving into the classification with Toledo. It was point-

³⁷ 66 Ohio St. 440, 447, 64 N.E. 420, 422 (1902).

³⁸ 66 Ohio St. 453, 64 N.E. 424 (1902).

ed out that the population differences between the various gradations of municipalities were too narrow to be significant. The court concluded that those considerations which tended to take the statute out of Article XIII, Section 1, tended to place it within the prohibition of Article II, Section 26. In the *Knisely* case, in short, the court indicated that it would no longer sanction legislative evasion of the constitution and that the pretence that the classifications were meaningful would no longer be kept up.

*Ohio ex rel. Attorney General v. Beacom*³⁹ was the last case in the series and it demolished the structure on the same day that the *Knisely* case was decided. Petitioners brought an action in quo warranto against the defendants, certain key municipal officers of Cleveland, and alleged that the act of March 16, 1891 under which defendants claimed office was invalid. The act in question operated on cities "of the second grade of the first class." Cleveland was the only Ohio city in that class. Judge Shauck, again speaking for a unanimous court, invalidated the statute on the authority of the *Knisely* case. In answer to the argument that the *de facto* government of the city should not be disturbed after the passage of years during which legislation of this character had not been disapproved, the court replied that, "[i]t is admitted that no limitation bars inquiry into the title of the defendants."⁴⁰ Judgment of ouster was granted and, because of the practical considerations of the maintenance of municipal government in Cleveland, execution of the judgment was suspended until October 2, 1902.

The governor called a special session of the General Assembly which met on August 25, 1902, and prepared a new municipal code.⁴¹ The Municipal Code of 1902⁴² swung to the opposite pole from isolation of municipalities into separate classes under the guise of classification: all municipal units in the state were placed in two classes. Those municipalities with a population of 5,000 or more were made cities and all below 5,000 were designated villages. Each of the groups was furnished with one uniform governmental scheme. This was no hardship for the villages but it created a situation for the cities which was as bad as, or worse than, that existing before the judicial ax fell. It was unworkable for a city such as Cleveland to have the same governmental structure and powers as a municipality of 5,500 or 6,000 population. The use of only two classes resulted in over-simplification of the problems of the most populous cities. However, it had one advantage. It placed the larger cities in such an impossible situation that their citizens became

³⁹ 66 Ohio St. 491, 64 N.E. 427 (1902).

⁴⁰ *Id.* at 507, 64 N.E. at 428 (1902).

⁴¹ See Fairlie, *The Municipal Crisis in Ohio*, 1 MICH. L. REV. 352 (1903).

⁴² Act of Oct. 22, 1902.

leaders in the municipal home rule movement. The results achieved by the Constitutional Convention of 1912 were in no small measure due to the felt necessities of the larger urban areas.

The Municipal Code of 1902 was upheld as a general act, having a uniform operation throughout the state in *Zumstein v. Mullen*.⁴³ The attack was fundamentally based on the claim that the provision for a different number of councilmen in different cities in reality constituted special legislation in the form of isolated classes according to the old scheme. The different provision for councilmen was based on a sliding scale closely keyed to population and the court found no difficulty in upholding it. Chief Justice Burket's opinion for the still unanimous court was notable for its analytical discussion and resolution of the claimed ambiguity in the method of computing the number of councilmen under the statute.

4. *The Present Constitutional Classification of Cities.*

(a) An exclusive population classification.

The adoption of Article XVIII, the "home rule amendment", transferred the dual classification of the Municipal Code of 1902 into the organic law. Section 1 provided for classification of municipalities as follows:

Municipal corporations are hereby classified into cities and villages. All such corporations having a population of five thousand or over shall be cities; all others shall be villages. The method of transition from one class to the other shall be regulated by law.

Section 2 of Article XVIII provided, in part, that, "[g]eneral laws shall be passed to provide for the incorporation and government of cities and villages." The two provisions just quoted did not result in placing the larger municipalities in the kind of a strait-jacket that they existed in from 1902 to 1912. Substantive home rule powers were granted directly to municipalities by other sections of Article XVIII and were not contingent upon the adoption of a home rule charter.⁴⁴ Thus, all municipalities were granted power under Section 3 to adopt and enforce "such local police, sanitary and other similar regulations, as are not in conflict with general laws."

It should be emphasized that Article XVIII, Section 1, provides an exclusive classification of municipalities as to population. There is nothing in the section which would or should exclude further classification on the basis of relevant factors unconnected with population.

(b) Classification as charter and non-charter.

⁴³ 67 Ohio St. 382, 66 N.E. 140 (1902).

⁴⁴ See Fordham and Asher, *Home Rule Powers in Theory and Practice*, 9 OHIO ST. L. J. 18 (1948).

In *Dillon v. Cleveland*⁴⁵ the court examined Ohio General Code Section 4227-12 which provided that certain foregoing sections of the General Code relating to the initiative and referendum should be inapplicable to any municipality operating under a home rule charter containing provisions for the initiative and referendum. It was claimed that the classification of municipalities into charter and non-charter units was prohibited by Article II, Section 26. The ready answer to this objection, as the court indicated, is that the very classification in question is recognized by the constitution.

(c) Geographical classification.

Geographical classification was upheld in *Board of Health v. Greenville*.⁴⁶ Section 1249 *et seq.*, General Code, authorized the state board of health to take certain action in connection with sewage, including requiring the construction and operation of sewage purification plants. It was further provided that no city or village which is discharging sewage⁴⁷ into any river which separates Ohio from another state (the court judicially noticed that this applied only to the Ohio River) would be required to install sewage purification plants as long as unpurified sewage of cities and villages of any other state is discharged into the river above the Ohio city or village.

The geographical classification affected by this proviso was the basis of an asserted violation of Article II, Section 26. The court upheld the classification. It would have been quite futile to have compelled those located upon the Ohio side of the Ohio river to refrain from pollution of the stream when it was being polluted by those on the other bank who were quite beyond the reach of the Ohio legislature. The sound basis for the decision was that the statute did operate as uniformly as the nature of the subject matter permitted. The court also pointed out that the class was an open one.

There is further authority to support the view that geographical classification is permissible in Ohio. In *State ex rel. Squire v. Cleveland*⁴⁸ the court had before it a statute relating to "[a]ll municipal corporations within the corporate limits of which there is or may hereafter be included part of the shore of the waters of Lake Erie."⁴⁹ Another section of the statute excepted Cleveland from the operation of its general provisions.⁵⁰ The trial court be-

⁴⁵ 117 Ohio St. 253, 153 N.E. 606 (1927).

⁴⁶ 86 Ohio St. 1, 98 N.E. 1019 (1912).

⁴⁷ The OHIO GEN. CODE provision read "is discharging sewage" whereas the Act of April 7, 1908 read "is now discharging sewage."

⁴⁸ 150 Ohio St. 303, 82 N.E. 2d 709 (1948).

⁴⁹ OHIO GEN. CODE § 3699-1.

⁵⁰ OHIO GEN. CODE § 3699-8.

lieved that the excepting provision invalidated the entire act on the ground that this particular section could not be dropped and the act extended to cover Cleveland because the legislature did not intend to include Cleveland and the court had no power to do so. The court of appeals reversed the judgment of the trial court and held that the statute, aside from the excepting provision, was valid. This was determined on the basis that the provision applicable only to Cleveland was merely a limitation on the territorial operation of the act and was, therefore, separable under the separability clause. Judge Stewart, who wrote the opinion for the supreme court, thought that the whole act was invalid under Article II, Section 26. Since, however, more than one of the members of the supreme court agreed on the theory propounded by the court of appeals that view prevailed.^{50a} The element of "naturalness" inherent in a geographical classification is a strong basis for upholding it. It is also readily apparent that a statute such as the one considered in the *Squire* case would have no applicability to other than littoral lands no matter how generally it was drafted.

The court's treatment of the provision excepting Cleveland from the operation of the statute is particularly interesting. It could have said that the excepting provision was invalid but to disregard it would result in applying the statute where the legislature had forbidden so the whole enactment must fall. Instead, the opposite result was achieved with an appropriate show of deference to the legislature.

In *Greenville v. Board of Health*,⁵¹ and in other cases, the court has been asked, in the event that an exception to a general statute shall be found to be unconstitutional, to disregard the exception and to apply the statute uniformly throughout the state. The court has consistently refused to accede on the ground that such action would invade the province of the general assembly in extending the operation of the statute in a manner expressly forbidden by the general assembly. The result of this view has been that where the exception is held invalid the whole statute falls with it. There is no disposition to underestimate the drastic effect of a holding of unconstitutionality. There must be, however, certain self-imposed judicial restraints when a statute is subjected to review and the one which refuses to extend a statute where the legislature has forbidden is based upon the most sound considerations of deference due a coordinate branch of the government.

B. COUNTIES

In *Andrews v. State ex rel. Henry*⁵² a statute providing for

^{50a} OHIO CONST. Art. IV, Sec. 2.

⁵¹ 86 Ohio St. 1, 98 N.E. 1019 (1912).

⁵² 104 Ohio St. 384, 135 N.E. 655 (1922).

bonds in criminal cases, in fact limited only to Cuyahoga County, was invalidated under Article II, Section 26. Judge Wanamaker, speaking for a unanimous court, strongly intimated that a classification of Cuyahoga County along with the other larger counties would be a reasonable one. It appears to the writer that there are no sound reasons which require county population classification to be more suspect than similar classification applied to municipalities. The fire prevention problem, for example, of counties containing organized areas would be roughly similar to one another and substantially different from predominantly rural counties.

County libraries are the subject of general legislation in Ohio. A statute concerning the establishment of libraries in general terms but actually applicable only to Hamilton County has been invalidated as contrary to Article II, Section 26.⁵³ The court thought that it was obvious that libraries could only be the proper subjects of general laws because knowledge was not more necessary or desirable in one part of the state than in another.

The problems arising under the general laws provision of the constitution have been far less acute in relation to counties than to municipalities. The Ohio Supreme Court has not treated counties in a significantly different manner from cities. Of course, there is no constitutional classification of counties.

C. SCHOOLS

By Article I, Section 7, of the constitution the legislature is exhorted to encourage schools. The cases reveal that the encouragement must be by general laws.

In *Minshall v. State ex rel. Merritt*⁵⁴ the court examined that provision of Ohio General Code Section 7749-1 which required a district board of education to furnish transportation for high school students when the county board of education so determined. There was no difficulty in upholding the statute in view of the express exception in Article II, Section 26, which allows statutes relating to the public schools to take effect upon the approval of an authority other than the General Assembly.

On April 2, 1902 the legislature passed an act establishing a special school district in parts of two counties. Quo warranto was brought to test its validity and, in *State ex rel. v. Spellmire*,⁵⁵ the court discussed the relevant cases in the course of holding the act invalid under Article II, Section 26. The court overruled the *Shearer* case,⁵⁶ which had stated the rule that special legislation

⁵³ *Brown v. State ex rel. Merland*, 120 Ohio St. 297, 166 N.E. 214 (1929).

⁵⁴ 124 Ohio St. 61, 176 N.E. 888 (1931).

⁵⁵ 67 Ohio St. 77, 65 N.E. 619 (1902).

⁵⁶ 46 Ohio St. 275, 21 N.E. 354 (1889). This resulted in reinstating *State v. Powers*, 38 Ohio St. 54 (1882) which had previously been overruled by the *Shearer* case.

was not prohibited as applied to subject matter local in nature such as schools. It was the view of Chief Justice Burket, speaking for a unanimous court, that there was no constitutional justification for the *Shearer* doctrine "of carving a special or local subject-matter out of one of a general nature."⁵⁷ The reversal was based on the purely logical grounds that no exception is expressed in Section 26. It had been argued for the defendants that an adverse decision might well jeopardize other school districts. Judgment of ouster was granted and the court emphasized that the judgment could be drawn so as to "protect the public interests."⁵⁸

In *Cline v. Martin*⁵⁹ the court upheld the validity of a statute which conferred authority on county boards of education to change school district lines in order to facilitate accessibility for all students served by the school. The charge of specialism deserved no more from the court than the statement that this was "undoubtedly" a law of a general nature which operated uniformly throughout the state.

D. TAXATION

In the taxation field we find, as we have in other areas, that the law as to the requirements of generality was well-established and then, after the lapse of years, the earlier decisions were rejected. It was once settled that a tax collector could be appointed for certain designated counties.⁶⁰ The rationale was that tax collection was clearly a matter of a local nature. The present rule is that the subject is of a general nature and that statutes concerning it must be of uniform operation throughout the state.⁶¹

In *Davis v. Wiemeyer*⁶² the court was confronted with the problem of the constitutionality of a statute which authorized, as to some property owners only, the assessment of real estate according to benefit received in the construction of a state highway.⁶³ The legislature attempted to authorize the county commissioners of counties having a tax duplicate of at least a certain amount to assess part of the cost against specially-benefited property owners. No such authorization was made as to those counties having a lesser tax duplicate. Judge Robinson, speaking for a unanimous court, said that the law was of a general nature and, therefore, was required to operate uniformly throughout the state. The court then proceeded to determine that the classification of property owners

⁵⁷ 67 Ohio St. 77, 89, 65 N.E. 619, 623 (1902).

⁵⁸ *Id.* at 90, 65 N.E. at 623.

⁵⁹ 94 Ohio St. 420, 115 N.E. 37 (1916).

⁶⁰ *State ex rel. Atty. Gen. v. Crites*, 48 Ohio St. 142, 26 N.E. 1052 (1891); *State ex rel. Ogilvie v. Capeller*, 39 Ohio St. 207 (1883).

⁶¹ *State ex rel. Wilson v. Lewis*, 74 Ohio St. 403, 78 N.E. 523 (1906).

⁶² 124 Ohio St. 103, 177 N.E. 37 (1931).

⁶³ OHIO GEN. CODE § 1193.

for purposes of assessment was unreasonable because the value of the tax duplicate of a county has no necessary relation to special benefit to a property owner. The opinion did not indicate that a classification of counties as to the value of tax duplicate would be banned by Article II, Section 26, for other purposes. The writer suggests that the court is to be commended for frankly examining the relationship between the classification utilized and the benefit conferred by the construction of the highway. In many instances the validity of the classification can be properly appraised only by examining its relation to the rest of the statute.

Article VI, Section 2 of the Ohio Constitution provides that the legislature "shall make," by taxation or otherwise, provision which "will secure a thorough and efficient system of common schools throughout the state." Section 7575, General Code, pursuant to the mandate, provided for a property tax levy equally throughout the state and for distribution of the proceeds to school districts according to need. In *Miller v. Korns*⁶⁴ the statute was attacked as contrary to both Article II, Section 26, and Article XII, Section 2, which provides for ad valorem taxation by uniform rule. The court said that the latter requirement was met by the tax being imposed equally on all property throughout the state and that unequal distribution of the proceeds was necessary to meet the constitutional requirement of an efficient school system. Of course, the argument of violation of Article II, Section 26, received short shrift in view of the provision relating to the establishment of an efficient school system throughout the state. There is no doubt that the court reached the correct result.

In *State ex rel. Brunenkant v. Wallace*,⁶⁵ Ohio General Code Sections 6290, and 6291, were attacked on the ground that uniformity was lacking because trackless trolleys were excluded from the definition of motor vehicle for the purposes of the annual license tax on motor vehicles. The court held that Article II, Section 26, was not violated by this statute as it operated uniformly on a territorial basis and applied equally to all persons and property intended to be brought within its operation. It appears to the writer that a different decision would have resulted in depriving the legislature of its discretion and policy-making power in the field of taxation. This would be an improper result in view of the well-settled power of the legislature to select the subjects and persons, within broad limits, to which a given tax will be made to apply. The statute under consideration amounted merely to a legislative determination that trackless trolleys would not be classified with motor vehicles in general for purposes of taxation.

⁶⁴ 107 Ohio St. 287, 140 N.E. 773 (1923).

⁶⁵ 137 Ohio St. 379, 30 N.E. 2d 696 (1940).

There is reason to believe that classification in taxation statutes will be upheld so long as fundamental tenets of fair play are not violated. In other words, where there is only a difference of opinion as to the propriety of the classification under consideration the court is not likely to invalidate the statute. This is but another example of the due regard which most courts have today for the exigencies of a sound tax-gathering system. The flow of revenue will not be hampered except when there are clear violations of constitutional mandates.⁶⁶

E. PUBLIC WORKS

The judicial treatment of the requirement of generality in statutes concerning public works has been variant. The initial Ohio view was set forth in a case where mandamus was asked to compel the commissioners of a particular county to act under a statute directing them to improve a particular road within the county.⁶⁷ The writ was allowed and the court brushed aside the argument that the statute violated the general laws provision by saying, "this provision does not affect the power of the legislature to pass local laws where the acts are in their nature local."⁶⁸ The other possible mode of treating the problem, that is, denominating roads a subject of general legislation and so one requiring uniform treatment throughout the state, did not initially win the court's support.

In *Hixson v. Burson*⁶⁹ the court had before it a statute which authorized any county having a population between 35,190 and 35,200 to construct roads within the county under certain conditions. The act applied actually only to Athens County. The court said that the statute was clearly a local one and the problem presented was whether the subject of roads was general in nature. After an elaborate discussion the court concluded that, "[i]t seems so clear that the subject of roads is of a general nature, that we would be doing violence to our oaths to hold otherwise"⁷⁰ and proceeded to overrule the inconsistent holding in the earlier case.

The rule as to highways enunciated by *Hixson v. Burson* was soon extended to bridges.⁷¹ In the face of a general law concerning

⁶⁶ This view was recently demonstrated in *Angell v. City of Toledo*, 153 Ohio St. 179, 91 N.E. 2d 250 (1950) where the plaintiff unsuccessfully sought the invalidation of the Toledo municipal income tax on constitutional grounds. The court was not impressed by dicta in an earlier case which supported plaintiff's position.

⁶⁷ *State ex rel. Hibbs v. Commissioners of Franklin County*, 35 Ohio St. 458 (1880).

⁶⁸ *Id.* at 467.

⁶⁹ 54 Ohio St. 470, 43 N.E. 1000 (1896).

⁷⁰ *Id.* at 485, 43 N.E. at 1003.

⁷¹ *State ex rel. Atty. Gen. v. Davis*, 55 Ohio St. 15, 44 N.E. 511 (1898).

the construction of bridges the legislature passed an abortive special statute dealing with bridges in Mahoning County. The existence of the general statute on bridges appeared to be a substantial factor in the holding that bridges were only appropriate subjects for general legislation. Where there is an operative general statute dealing with a subject, it should certainly receive judicial consideration in the determination of the generality of the subject matter.

In *Thorniley v. State ex rel. Dickey*,⁷² the court approved and followed the *Hixson* case and *State ex rel. Attorney General v. Davis*⁷³ in the course of holding Section 4903 of the Revised Statutes unconstitutional. The statute was deemed to be repugnant to the generality requirement of the constitution in that it was an essential part of a statute making different provision for the management of highways in different counties of the state. No rational basis was discovered for the differentiation in treatment and it was noted that the counties to which the special legislation applied were the most, as well as the least, populous in the state. The invalidated section itself only related to the compensation of county commissioners for services rendered as highway directors and the same result could have been reached by holding that it was repealed by a later inconsistent statute which specified the salaries of county commissioners and limited their salaries to such amount.⁷⁴

The *Hixson* case substantially represents the Ohio rule today. It appears that the rule is sound in two important respects: (1) It closes a loophole in the constitutional requirement of general legislation. The loophole amounted to saying that a bridge or a road was localized in a particular area of the state and could, therefore, be dealt with by special or local legislation. It is believed that this was nothing more than a play on words. (2) As a practical matter it has been shown that general laws are most efficacious in the public works field. It would be difficult to show any defects of the present system comparable to the log-rolling which was prevalent under the old system of special legislation.

It appears that logic alone has not proven an unerring guide in this area. The modern Ohio law has come into existence after the court has had full opportunity to appraise the working results of both special and general legislation in the field. The courts' resolution of the problem purports to have discovered the key to what the constitution really means. The writer suggests, however, that what the court has really done is to resolve a question of legislative policy in much the same manner that the legislature would

⁷² 81 Ohio St. 108, 90 N.E. 144 (1909).

⁷³ 55 Ohio St. 15, 44 N.E. 511 (1896).

⁷⁴ Act of April 21, 1904.

do if it had the power. The court has decided that general statutes are probably better in the public works area. In other words, the court originally determined that the legislative decision to use special laws was reasonable and now only general laws on this subject are so held.

F. ELECTIONS.

Statutes providing for and regulating primary elections have been unsuccessfully attacked as contrary to the general laws provision.⁷⁵ The permissive primary election applied only to those parties which cast at least ten per centum of the vote at the last general election but this was not held to be an unreasonable classification. In the same case it was determined that the existence of special primary election statutes in three counties of the state did not prevent the general statute from operating uniformly throughout the state as no geographical restrictions were imposed upon it.⁷⁶

In *State ex rel. Wilmot v. Buckley*⁷⁷ the court passed on a statute concerning election boards which specifically exempted Mansfield and cities of the fourth grade of the first class from its operation. There was no difficulty in finding that the act was violative of the uniformity requirement of Article II, Section 26. In answer to the argument that the exceptions should be disregarded and the legislation applied uniformly, the court replied that there was a difference between an exception and a limitation and that this was an exception and the court had no power to extend the act where the legislature had forbidden. The case is also noteworthy for an interesting dictum to the effect that the old election statute contained a valid classification as far as cities went but that there was no authority to classify counties as to elections.⁷⁸ There was little indication as to why counties should be treated differently in this respect.

In *Gentsch v. State ex rel. McGorray*⁷⁹ the court upheld Revised Statutes Section 2926o which provided that in all cities of a population of 300,000 or more or which later attained such a population the polls should be open on election day from five-thirty o'clock in the morning until four o'clock in the afternoon. Section 2926a provided that the polls should close at 5:30 in the afternoon in all other cities where registration was required. Only Cincinnati and Cleveland would be required to close their polls at four o'clock at the time of the decision but the court was impressed by the open-end character of the classification. The reasonableness of the

⁷⁵ *State ex rel. Webber v. Felton*, 77 Ohio St. 554, 84 N.E. 85 (1908).

⁷⁶ *Id.* at 579, 84 N.E. at 90.

⁷⁷ 60 Ohio St. 273, 54 N.E. 272 (1899).

⁷⁸ *Id.* at 297, 54 N.E. at 276.

⁷⁹ 71 Ohio St. 151, 72 N.E. 900 (1904).

classification was approved on the ground that fraud was more likely to occur in large cities under cover of darkness. The court concluded that the statute was general and operated uniformly within the requirements of Article II, Section 26. There appears to be no doubt but that the classification was as wide as the evil to be corrected and this should be enough.

*State ex rel. Weinberger v. Miller*⁸⁰ upheld an act passed by the legislature to provide for the election of judges by separate non-partisan ballot. The decision was by a three-to-two vote and was characterized by sharp dissenting opinions based on the stated improper treatment of illiterate voters. Judge Donahue, writing for the majority gave only brief attention to the claim of invalidity under Article II, Section 26, and disposed of it on the grounds that the legislature had power to treat elections for different types of offices differently. The result was buttressed by an extended discussion of the requirements for judicial office in contrast to those for legislative and executive positions. The majority opinion also pointed out that separate ballots were not previously unknown in Ohio. At this writing there is nothing surprising about the decision because of the contemporary widespread use of the separate non-political judicial ballot.⁸¹

G. MISCELLANEOUS

1. Crime

Laws defining crimes and prescribing punishment therefor must comply with the general laws provision.⁸²

2. Jury Trial

A statute imposing certain restrictions on the right to trial by jury in "all counties which now contain, or which may contain a city of the second grade of the first class" was invalidated in *Silberman v. Hay*⁸³ as contrary to the general laws provision. The "classification" was applicable only to Cuyahoga County and the court stated that no subject was more clearly of a general nature than the basic right to trial by jury. Judge Minshall carefully distinguished the facts under consideration from those in an earlier

⁸⁰ 87 Ohio St. 12, 99 N.E. 1078 (1912).

⁸¹ It is noteworthy that at the time of the decision in the *Miller* case the provision of Article IV, Section 2 requiring more than a majority vote in the supreme court to hold a law unconstitutional had been adopted but was not yet effective. Judge Donahue said, "The fact that it has been adopted shows that the people of this state are of the opinion that courts have been too ready to find constitutional objection to legislation." *Id.* at 30, 99 N.E. at 1080.

⁸² In *Ex Parte Falk*, 42 Ohio St. 638 (1885) it was held that a statute purporting to make it a crime to be found in or near a certain city with burglar's tools was invalid as contrary to the general laws provision.

⁸³ 59 Ohio St. 582, 53 N.E. 258 (1899).

case which upheld a mode of selecting jurors in Cuyahoga County differently from the provision made under the general law.⁸⁴ It is doubtful whether such a statute would be upheld today.

3. *Personal Property.*

Statutes which classified beer bottles and similar containers separately from other personal property have been held to be general statutes with the requisite uniform operation throughout the state.⁸⁵ In reaching this result the court was careful to point out that containers of the type under consideration were different from other personal property in that their normal use required them to be temporarily in the possession of the purchaser of their contents. The owner of the container customarily had his trade name or mark blown into the bottle.

4. *Relief*

In *State ex rel. De Woody v. Bixler*⁸⁶ the court examined a statute which permitted county commissioners, by a two-thirds vote, to establish a poor relief distributing fund and which required them to take such action when requested by resolution of a taxing authority administering relief within the county.⁸⁷ The statute was upheld against an attack under that provision of Article II, Section 26, which declares that no act, except those relating to public schools, shall be passed "to take effect upon the approval of any other authority than the General Assembly . . ." Judge Williams, writing for a unanimous court, said that the county commissioners were, at most, required to make a factual determination. The decision is in accord with the modern view that the legislature may delegate the power to make determinations of fact.

5. *Trust Companies*

Legislation purporting to authorize probate courts in some counties only to appoint trust companies to act as administrators of decedents' estates has been invalidated as contrary to the general laws provision.⁸⁸ It is not believed that the decision would preclude general legislation in the field.

H. EVALUATION

The crucial test of the workability of population classifications is usually found in their application to municipalities. As has already been indicated, the Ohio pattern of two population groupings for all municipalities would result in severe hardship were it not

⁸⁴ *McGill v State*, 34 Ohio St. 228 (1878).

⁸⁵ *Renner Brewing Co. v. Rolland*, 96 Ohio St. 432, 118 N.E. 118 (1917).

⁸⁶ 136 Ohio St. 263, 25 N.E. 2d 341 (1940).

⁸⁷ OHIO GEN. CODE § 6309-2.

⁸⁸ *Schumacher v. McCallip*, 69 Ohio St. 500, 69 N.E. 986 (1904).

for the existence of substantive home rule powers for municipalities.⁸⁹

Classification of municipalities into broad and substantial population groups is widely upheld even though there may be many more groups than are permitted under the Ohio Constitution. Such classification finds ready judicial acceptance even though there may be wide factual divergences within cities of the same general size.⁹⁰ The reason for the popularity of population groupings is probably that such classification involves general similarity within the class in respect to population which, in turn, is thought to have at least some relevance to the character and scope of many municipal problems. It is true that large metropolitan areas have serious problems in connection with crime prevention, for example, which are not found in rural areas. It is very doubtful, however, that there is as complete similarity as might be expected in regard to particular types of municipal activities, such as the need for fire or police protection, within cities of the same population group.⁹¹ It is thought that these considerations do not tend to destroy the validity of population classification. After all, the purpose of the constitutional provisions is to prevent the abuses of special legislation for each municipality. Even though population groupings are rather rough and ready, they are sufficiently removed from specialism to justify validation. Of course, the judiciary should not approve merely sham classification.

While population groupings provide only a general guide to municipal similarities, practical considerations are strongly in their favor. It would be well-nigh an impossible task to draft a statute with base classifications which take account of almost every point of difference and which, at the same time, do not constitute specialism in fact under the guise of classification.

Germaneness of the population classification to the purpose of the law should be a factor which receives careful judicial consideration. The population classification should have *some* real bearing on the problem at hand.⁹² An established population classification should be used where appropriate, but it should not be utilized to prevent geographical classification, for example, when only such

⁸⁹ See note 44 *supra*.

⁹⁰ See the cases cited in 2 SUTHERLAND, STATUTORY CONSTRUCTION § 2109 (3rd ed., Horack, 1943).

⁹¹ For a study of the lack of relation between population and area and various other factors see Horack and Welsh, *Special Legislation: Another Twilight Zone*, 12 IND. L. J. 109, 183, 184-186 (1936).

⁹² See, e.g., *State ex rel. Fire District of Lemay v. Smith*, 353 Mo. 807, 184 S.W. 2d 593 (1945) which upheld a population classification related to fire protection purposes even though St. Louis County was the only one in the class.

classification can give coherence to a law. It is believed that the Ohio court has been wise to uphold geographical classification as in accord with realities even though it finds no express sanction in the constitution.

The courts frequently test population classification by determining whether it is "open-end" so that the subjects of the law can move from one class to another as populations change. Stated negatively, frozen population classifications (which are frequently limited to a particular census) are invalid. This writer believes that it is entirely proper to require classifications to be fluid. Otherwise, the degree of artificiality present in the classification is likely to increase proportionately to the time the classes have been frozen. It should at least be required of population classes that they accurately reflect population as of the present time.

The Ohio cases have generally stated uniformity of operation to be a separate requirement. Frequently the subject matter of the statute will be determined to be of a general nature and then the statute will be invalidated on the ground that it fails to have a uniform operation throughout the state. It is believed that this is merely a roundabout method of saying that the statute is special and the constitution requires it to be general, so it must fall. If a statute particularizes within a possible and practical general classification it is special law. A statute is a general one if it applies equally to all those within the classification it establishes. If the classification is unreasonable the statute can either be invalidated on due process grounds or because the classification is not sufficiently related to the subject matter of the legislation. The Ohio court's frequent reference to "uniform operation throughout the State" is understandable because, after all, the language does appear in the constitution. It is far, however, from constituting a solving concept.⁹³

Curative Statutes

The problem of generality as opposed to specialism also arises in connection with curative and retroactive legislation. The partic-

⁹³ Some cases illustrate a realistic use of the uniformity provision:

In *State ex rel. Strain v. Houston*, 138 Ohio St. 203, 34 N.E. 2d 219 (1941) the court upheld the validity of a statute requiring city fire departments to meet certain minimum standards. The opinion briefly considered the claim that the statute lacked uniform operation in that it applied only to cities and dismissed it on the grounds that the constitution recognized reasonable classifications including the classifications of cities and villages.

In *State ex rel. Outcalt v. Guckenberger*, 134 Ohio St. 457, 17 N.E. 2d 743 (1938), the court upheld the constitutionality of the Whittemore Acts which, in the period of the depression, remitted penalties and interest on taxes as an inducement to payment. The court specifically stated that the uniformity provision of Article II, Section 26 was not violated as the questioned statutes operated equally upon persons and property similarly situated.

ular problems raised under the Ohio constitutional provision are, however, sufficiently different from the problems thus far covered in this paper to justify separate treatment. It may be helpful at the outset to suggest definitions of the kind of legislation under consideration. A curative (or validating) statute, most simply viewed, is one designed to cure legal defects in either prior acts or prior legislation or in both. Such a statute is usually a retroactive one. A retroactive (or retrospective) statute is one which affects acts or legal relations existing before the statute came into operation.

In addition to the provision forbidding the impairment of contracts, which is beyond the scope of this article, Article II, Section 28, of the Ohio Constitution contains both a flat prohibition and a limited authorization. The first clause in the section states that "[t]he General Assembly shall have no power to pass retroactive laws." This has been held to constitute a flat prohibition of such laws.⁹⁴ The third portion of the section, the significant one for purposes of this discussion, provides that the legislature may, "by general laws" authorize courts to effectuate on equitable terms "the manifest intention of parties, and officers, by curing omissions, defects and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this State."

Curative statutes are usually plainly retroactive in effect, so the provision just quoted may be treated as an exception to the broad prohibition against retroactive laws found in the same article of the constitution. Is there anything which requires curative legislation to be only retroactive in operation? The constitutional provision itself, of course, contemplates the effectuation of prior acts. However, this is not to specify the method by which such acts are to be effectuated. A careful reading of the provision fails to reveal an express interdiction of prospective or open-end curative statutes. There is no reason why a statute drafted to effectuate acts, insufficient or defective in themselves, occurring in the future would not meet the literal language of the constitution. The requirement that the effectuation be by means of general laws seems to add considerable strength to the conclusion that "open-end" legislation is desirable. Indeed, as we have already seen, there is much authority which indicates that such prospective character is essential to the validity of a general law.

What arguments can be mustered to oppose general and prospective curative legislation? Such a question requires analysis of the practical and common-sense reasons behind a constitutional

⁹⁴ *Safford v. Metropolitan Life Ins. Co.*, 119 Ohio St. 332, 164 N.E. 351 (1928). The prohibition against retroactive laws does not include those of a procedural or remedial nature. *State ex rel. Slaughter v. Industrial Commission of Ohio*, 132 Ohio St. 537, 9 N.E. 2d 505 (1937).

authorization of curative legislation. One substantial policy basis is the recognition that a substantial portion of state and local business is conducted by laymen unfamiliar with legal intricacies. It is believed that the logic behind the constitutional provision is that where there are policy reasons to effectuate otherwise legally unmeaningful acts that the legislature should have specific authorization in the constitution to carry such acts into effect. The legislature will determine whether the conditions which exist and the acts which have been done are entitled to validation. Whether the legislature bases its policy determination on the good faith and substantial compliance with the law by the parties or officials or on the necessity of avoiding undesirable consequences or uncertainty where the legally inadequate action has been relied upon is unimportant so long as the legislative effectuation is on such terms, according to the constitutional wording, "as shall be just and equitable."

Would the fundamental policy enunciated be undermined by a general law operating prospectively which undertook to validate future deficient acts which were based upon a prescribed degree of compliance with other existing law or upon the presence of good faith on the part of some or all of the parties? This question would be almost instantly met by the objection that such a law would encourage disregard of the law generally on the assumption that all, or at least many, defects would be automatically cured by the suggested general and prospective curative statute. To state such an objection is to acknowledge its merit. Such a course of conduct would perhaps be unwise for a legislature to follow. Even so, it is doubtful whether unwisdom alone would answer the question of the constitutionality of such a measure. As a matter of law such a statute would amount to nothing more than a legislative declaration that the law shall not be so strict in reference to those matters capable of validation under the prospective curative statute. It should not be forgotten that we are interpreting a constitutional requirement that curative laws be general ones. Whatever might be a court's view as to the wisdom of an "open-end" curative statute, it is submitted that there would be no proper occasion for the use of the drastic step of a judicial declaration of unconstitutionality.

It has not been the purpose of the foregoing discussion to suggest that "closed" curative statutes are invalid. The purpose has been, rather, to explore fully the considerations relevant to "open-end" curative statutes. In view of the plain requirement that curative laws must be general laws, a fundamental question in connection with the validity of "closed" curative statutes is whether such a statute with a "frozen" classification can qualify as a general law. As applied to municipalities such classification

based on population would clearly be invalid under Article XVIII, Section 1, which requires "transition" from the one class to the other. Different considerations, however, may be relevant when a "closed" basis of operation is employed in curative legislation. The problem here is whether past acts can constitute a reasonable basis for the operation of curative legislation. Suppose, for example, that a statute passed in 1949 ordains that all persons who were the victims of torts committed by the state between 1943 and 1947 should be awarded damages in a prescribed manner. Is the stated period of time a reasonable basis for the operation of the legislation? Stated differently, is the basis so unreasonable as to warrant invalidation? Probably the statute is inadequate if there is no other provision made for those similarly situated who were victimized before 1943 and after 1947. But this is a far cry from deeming it unreasonable. Standards of reasonableness lack precision and in this situation, where the time period is assumed to have some relation to the injuries suffered, it seems proper to uphold the legislative determination. Further support for this view can be found in the legislature's acknowledged policy power in respect to curative statutes. The legislature determines initially whether a particular subject matter can be appropriately dealt with by a curative statute and, within certain broad limits, it should have the power to prescribe the operative time, including the beginning and terminal dates, of curative legislation enacted. As a practical matter in Ohio there should be no question as to the validity of "frozen" curative legislation because the Ohio Supreme Court has actually gone so far as to uphold special curative legislation which is applicable only to a past event and to one named individual.⁹⁵

In *Spitzig v. State ex rel. Hile*⁹⁶ a special statute based on a personal injury fact background was presented to the court. One Spitzig was summoned as a juror and while so acting and in the absence of negligence on his part was injured due to the falling of a courthouse elevator. The legislature passed a special statute authorizing the county commissioners of Cuyahoga to pay the victim a sum not exceeding \$15,000. A taxpayer sued to enjoin the payment of \$12,500, which sum had been set pursuant to the terms of the statute. The court emphasized that it had only the constitutional question to decide.

Judge Kinkade, who wrote for the unanimous court which upheld the validity of the statute, appeared to reason in the following manner: (1) The facts were undisputed. (2) The legislature found that the injury to Spitzig imposed a moral obligation on the

⁹⁵ See note 96 *infra*.

⁹⁶ 119 Ohio St. 117, 162 N.E. 394 (1928).

state. (3) The payment of \$12,500 was only compensation and was in no sense a gratuity extended by the county to Spitzig."⁹⁷ (4) The special statute did not violate the state constitution because where the state acknowledges a moral obligation the prohibition of retroactive laws found in Article II, Section 28, is inapplicable. (5) Although the moral obligation does not amount to a legal one, it is "unthinkable" that the state be powerless to act in the premises.

Implicit in the holding that Article II, Section 26, also was inapplicable was the determination that the statute in question was a law of a special nature. Aside from the implication just mentioned, the court repeatedly referred to the statute as a special one. How then did it overcome the obstacle presented by the general law requirement of Article II, Section 28? The writer is unable to answer this question other than to say it appears that the court simply ignored the requirement. The conclusion that the payment to Spitzig was compensation rather than gratuity may be questionable in view of the legislative finding of only a moral obligation resting upon the state. In any event, the legislature did formulate the policy that Spitzig should be paid. It is quite clear that the court's view that the statute was special was correct because it applied only to Spitzig. Certainly it was retroactive in operation and basing it upon a moral obligation, without more, does not render the general law requirement inapplicable. It is submitted that there is no sound reason for the court's validation of special legislation, once the legislature has found a moral obligation, in the face of the contrary unequivocal constitutional mandate. It will not do to rationalize the result in terms of some inarticulate judicial feeling that general legislation would not be applicable to the fact situation; such an argument does not apply to the Ohio Constitution. Even though one rebels against the conception of public irresponsibility present in the concept of sovereign immunity from tort liability, it is well to recognize that the constitution provides a means to accomplish the laudable objective which the legislature had in providing for Spitzig's relief. A general statute passed for the relief of all those now or later situated similarly to Spitzig would comply with the requirements of Article II, Section 28.

It is frequently said that a legislature cannot do by a validating act that which was originally beyond its power. The Ohio general assembly once attempted to provide that special school districts previously invalidated would become valid special school districts under the provisions of a validating act.⁹⁸ The court struck down the supposed validating act without hesitation and said that the

⁹⁷ *Id.* at 120, 162 N.E. at 395.

⁹⁸ *Bartlett v. State*, 73 Ohio St. 54, 75 N.E. 939 (1905).

legislature's power "to validate any void or ineffectual act is limited to such acts as it might have originally performed or authorized."⁹⁹

It is essential that the curative statute be worded sufficiently broadly to remedy the defect which the legislature intends to reach. In one case failure to advertise for bids pursuant to the requirement of an existing statute was not validated by a later statute which purported to cure the defect because the later statute was carelessly drawn too narrowly.¹⁰⁰

In *Kumler v. Silsbee*¹⁰¹ the court had before it a statute which provided that where any municipal corporation previously had granted by ordinance the right to lay pipes and drains below the surface of its streets that such ordinance should be held valid and binding as if the municipality had had express authority so to grant. The claims were made that the statute was unconstitutional because it was retroactive and so violated Article II, Section 28, and because it was a special grant of corporate power and so violated Article 13, Section 1. The court held that the act, as a curative one, was within that exception to the prohibition against retroactive laws. Without extended discussion the court held the statute to be general. It is implicit in the opinion that curative acts must be general.

Curative acts are a valuable legislative tool to help smooth the administration of government and to prevent wrongs from going without effective legal remedies. The requirement of the Ohio Constitution that such acts must be general is entirely workable and the courts should see that purported curative legislation meets the constitutional test.

Express Prohibitions on Special Legislation

Article II, Section 32, put an end to legislative divorces in Ohio.¹⁰²

The leading case for our purposes on Article XIII, Section 1, which as we have seen forbids special acts conferring corporate power, is the *Cincinnati Hospital* case which was discussed earlier in this article.¹⁰³ In this case the court held void a statute which attempted to confer corporate power on a named municipally-owned hospital. The case shows that even though this constitutional provision is frequently thought of in connection with private cor-

⁹⁹ *Id.* at 57, 75 N.E. at 940.

¹⁰⁰ *Cowen v. State ex rel. Donovan*, 101 Ohio St. 387, 129 N.E. 719 (1920).

¹⁰¹ 38 Ohio St. 445 (1882).

¹⁰² For the background of legislative divorces in Ohio see Woodbridge, *A History of Separation of Powers in Ohio: A Study in Administrative Law*, 13 U. OF CINN. L.R. 191, 251-255 (1939).

¹⁰³ See note 34 *supra*.

porations, it can also apply to municipal corporations.¹⁰⁴

Requirements or Authorizations of Special Legislation

The implicit requirement of specialism for the creation of new counties and for certain other purposes has already been mentioned.¹⁰⁵

Article IV, Section 1, of the Ohio Constitution provides that the judicial power of the state is vested in a supreme court, courts of appeals, courts of common pleas, courts of probate, and such other courts inferior to the courts of appeals as may from time to time be established by law.

In *Kelley v. State*¹⁰⁶ the court considered a statute of April 9, 1856 which conferred certain criminal jurisdiction on some of the common pleas courts of the state and not on others. By a three-to-two decision the court determined that the courts of common pleas in Ohio were an organization of a general nature and that the laws dealing with them must, therefore, be of a general nature. It was also stated that these laws "are imperatively required to have a uniform operation throughout the state."¹⁰⁷ The reasoning of the court was mechanical but the decision effectively prevented special legislation applicable to the lower courts.

In *Wallace v. Leiter*¹⁰⁸ a statute which provided that there should be an appeal in certain counties from the probate court to the circuit court in specified cases was invalidated as a general law not having uniform operation. In a brief opinion the court stated its reliance on the well settled rule of the *Kelley* case.

In two interesting cases the court examined legislation dealing with probate courts. In the first case, *Squire, Superintendent of Banks, v. Bates*,¹⁰⁹ the court invalidated Ohio General Code Section 10501-62, which provided for divergent methods of appeal from probate courts. The statutory method provided that in instances where the probate judge had the qualifications prescribed by law for common pleas judges, appeal was taken directly to the court of appeals. In other instances the appeal was to the common pleas court. Judge Zimmerman, speaking for a unanimous court, stressed that the result of the method was to make appeals dependent upon the qualifications of the particular probate judge. The opinion stated that because the statute concerned the appellate

¹⁰⁴ In a leading case the trial court thought that if the questioned statutes were not invalid as contrary to the general laws provision that they should fall under Article XIII, Section 1. *State ex rel. Squire v. Cleveland*, 150 Ohio St. 303, 82 N.E. 2d 709 (1948).

¹⁰⁵ See page 464 *supra*.

¹⁰⁶ 6 Ohio St. 269 (1856).

¹⁰⁷ *Id.* at 272.

¹⁰⁸ 76 Ohio St. 185, 81 N.E. 187 (1907).

¹⁰⁹ 132 Ohio St. 161, 5 N.E. 2d 690 (1936).

jurisdiction of two constitutional courts that it was a law of a general nature and failed to have the requisite uniform operation.

In *re Estate of Bates*¹¹⁰ presented a situation readily distinguishable from the foregoing one. Section 10501-56, General Code, provided that when a record was not made at the hearing of a matter before the probate court, an appeal on law and fact may be taken to the common pleas court. Judge Matthias, writing for the unanimous court, emphasized that the legislation merely provided an optional method of procedure. The argument that the statute was invalid as not having uniform operation was based on the fact that some probate courts were combined with common pleas courts and that therefore the statute only applied to probate courts as such. The court readily conceded that this was the situation but apparently thought that the classification of probate courts which were not combined with common pleas courts was a reasonable one. The statute applied only to appeal proceedings and applied uniformly to separate probate courts throughout the state. It is clear that so long as some probate courts are combined with common pleas courts and are known as "common pleas courts" and the others are separate and are known as "probate courts" that it is entirely proper to treat the latter as a separate class for such purposes as appeal to the common pleas courts. It would, of course, be ridiculous to allow such an appeal for the former class as it would result in an appeal taken from a court to the same court.

The reader will have noted that all the cases dealing with courts which have been discussed thus far have been concerned with the constitutional courts enumerated in Article IV, Section 1. This provision of the constitution also refers to "such other courts inferior to the courts of appeals as may from time to time be established by law." This is interpreted to refer to laws passed by the legislature; the power to establish courts is held to be beyond the home rule powers of municipalities.¹¹¹ The uniformity requirement of Article II, Section 26, is regarded as inapplicable to the creation of inferior courts and the general assembly has commonly created particular municipal courts by special laws.¹¹² In an important case where the problem could have been raised, the requirement of the general laws provision was not even mentioned.¹¹³ It is believed fair to assert that Ohio has, in this area done violence to the policy favoring general legislation. It would seem that this area would be an ideal one in which to use general

¹¹⁰ 142 Ohio St. 622, 53 N.E. 2d 787 (1944).

¹¹¹ *State ex rel. Cherrington v. Hutsinpillar*, 112 Ohio St. 468, 147 N.E. 647 (1925).

¹¹² OHIO GEN. CODE § 1558-1 *et. seq.*

¹¹³ *State ex rel. Fox v. Yeatman*, 98 Ohio St. 44, 105 N.E. 74 (1913).

legislation which varied the number of judges in relation to the population of the communities served. The judiciary has the power to determine the meaning of the constitutional requirement of general laws in this field. The constitution is not crystal clear on the point and the judges, therefore, should not be adverse to considering factors of policy and practicality. In many instances the feasibility of a general statute is a policy determination rather than an inevitable decision deduced from fixed principles.

Express Requirements of General Legislation

Article XIII, Section 6, which requires general laws for the organization of municipalities may be regarded as a specific implementation of Article II, Section 26, which, of course, applies to municipalities also. Where a special statute attempts to regulate municipal organization the court could point to either Article XIII, Section 6, or to the general laws provision. In the same way, Article X, Section 1, which requires general laws for the organization and government of counties, could be used as an alternative to the general laws provision.

Section 2 of Article XIII requires general incorporation acts for private corporations. It has been held that this provision grants wide authority to form new corporations and to effect changes in existing ones so long as general laws are utilized.¹¹⁴

Some Policy Factors

The plethora of interpretive problems arising under the constitutional provisions examined in this article could lead one to the conclusion that judicial determination of requirements of generality in legislation has not been altogether successful. Very few subjects of legislation, however, are "naturally" the subject for either a general or a special law. The very simplicity of the language "[a]ll laws, of a general nature" may tend to lull one into a sense of complacency as to the character of interpretive problems. Experience has shown that the problems under the general laws provision are as formidable as those arising under the equally simple phrase "all powers of local self-government" found in the home rule amendment. Therefore, there must be one authoritative interpreter.

Would the situation be improved by making the legislature the sole judge of the applicability of a general law? There are several arguments which can be mustered on the negative side. Prior to the *Beacom*¹¹⁵ case the legislature pretty much had the final say and the record was one of evasion and disregard of the constitutional mandate. An important argument is that legislative

¹¹⁴ *Belden v. Union Central Ins. Co.*, 143 Ohio St. 329, 55 N.E. 2d 629 (1944).

¹¹⁵ See note 39 *supra*.

solutions frequently must be based on compromise and expediency. The legislative process does not lend itself to that detached consideration which is necessary for constitutional interpretation. Another objection would be that legislative interpretation would probably result in a patchwork of particular solutions rather than an integrated pattern. Finally, it would be out of harmony with the existing method of constitutional interpretation to entrust this part of the constitution to the legislature.

On the other side of the argument is that a purely logical analysis of the constitutional requirements is not enough. The judicial process, so the argument would run, is not well fitted to make a broad gauged inquiry into the considerations dictating the use of a particular type of statute. The legislature could acquire the factual information on which a sound policy decision could be based. If the legislative solution were deemed inappropriate, the law could be repealed and a more workable one enacted. Other provisions of the constitution could be relied upon to prevent legislative abuse in this area. "The question, 'could a general law be made applicable?' does not really call for interpretation and application of existing law but requires a policy determination as to whether the subject is one which could be effectually dealt with by general law."¹¹⁶

We are committed to judicial review and it is at least doubtful as to whether the Ohio Supreme Court should be displaced as the arbiter of general as opposed to special legislation. Would it not be more profitable to press for an affirmative vote on the question of a constitutional convention at the general election in November, 1952 so that the whole question of the present constitutional requirements of general and special laws could be opened? If this were done, the court could be presented with a much more coherent pattern than now obtains. It is incongruous to permit special laws for the creation of inferior courts when there is no reason to believe that the subject is not readily susceptible to general legislation. By the same reasoning, the special laws subject to local referendum authorized in Article II, Section 30, are undesirable.¹¹⁷

It cannot be overemphasized that the court's function in passing on an initial legislative determination of the type of statute to be employed is one calling for the exercise of judicial talents of the highest order. The judges must steer a middle course between credulity where only form supports the legislative determination and over-zealousness for precision where the legislative determination appears rough but is nonetheless supportable. They should

¹¹⁶ FORDHAM, *LOCAL GOVERNMENT LAW* 60 (1949).

¹¹⁷ See Fordham, *Some Aspects of Constitutional Revision in Ohio*, 23 OHIO BAR 181, 186 (1950).

recognize, for example, that in some circumstances a general law may operate on a very limited number of persons and still be valid. In the words of Judge Cardozo, "Time with its tides brings new conditions which must be cared for by new laws. Sometimes the new conditions affect the members of a class. If so, the correcting statute must apply to all alike. Sometimes the new conditions affect one only or a few. If so, the correcting statute may be as narrow as the mischief."¹¹⁸

¹¹⁸ *Williams v. Mayor and Council of Baltimore*, 289 U.S. 36, 46 (1933).